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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO AVALOS AVALOS,

Defendant and Appellant.

F045379

(Super. Ct. No. 3907567-2)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones and Alan Simpson, Judges.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, J. Robert Jibson and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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On November 13, 2003, a felony complaint was filed in Fresno County Superior Court, charging Alfredo Avalos Avalos with two counts of forcible lewd act on a child

under the age of 14 (Pen. Code,¹ § 288, subd. (b); counts 1 & 4), two counts of forcible rape (§ 261, subd. (a)(2); counts 2 & 5), and two counts of aggravated sexual assault of a child (§ 269, subd. (a)(1) [rape]; counts 3 & 6). After initially pleading not guilty, Avalos withdrew his not guilty plea and pled no contest to a single violation of section 288, subdivision (a) (count 1, as amended). Conditions included a middle term sentence and indicated mitigated sentence, referral for a section 288.1 examination, and dismissal of the remaining counts. Avalos's subsequent motion to withdraw his plea was denied, and he was sentenced to three years in prison and ordered to pay various fines and fees and to register as a sex offender. He now appeals, claiming he should be afforded another opportunity to withdraw his plea because he was misadvised of the consequences thereof.² For the reasons which follow, we will affirm the judgment but order a minor modification in the abstract of judgment.

FACTS

The facts underlying the charged offenses are not relevant to the issue raised on appeal. According to the probation officer's report, the 13-year-old victim reported that Avalos had nonconsensual sexual intercourse with her on two separate occasions.

At the change of plea hearing, defense counsel recited the terms of the plea agreement, specifically that there was a mid-term lid, the court had indicated no more than the mitigated term, and the parties had agreed to an examination pursuant to section 288.1. Avalos stated that he accepted that plea agreement. He further stated that he understood and initialed everything contained in the written change of plea and waiver of

¹ All statutory references are to the Penal Code. All references to rules are to the California Rules of Court.

² As required, Avalos filed a timely notice of statement of reasons and obtained a certificate of probable cause. (§ 1237.5; rule 30(b); see, e.g., *In re Chavez* (2003) 30 Cal.4th 643, 657; *People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

rights form. Included on that form was the advisement that the maximum sentence he could receive was eight years in prison. The court advised Avalos of his rights and obtained Avalos's personal waiver thereof, and the parties stipulated that the court could use the complaint and police report to establish a factual basis for the plea. The court accepted the no contest plea; as a result, the People moved to dismiss the remaining charges with a reservation of the right to comment thereon.

The probation officer's report recommended imposition of the six-year middle term. By contrast, the section 288.1 evaluation found Avalos to be a suitable candidate for probation. At the initial sentencing hearing, defense counsel argued for a grant of probation, but the prosecutor pointed out that, even though the rape allegations were dismissed because the People were unable to prove force, Avalos was a 29-year-old man who admitted having sexual intercourse with a 13-year-old girl while living in her home. Sentencing was continued so the court could read and consider some additional materials, but the court cautioned that Avalos might go to prison anyway.

At the continued sentencing hearing, the court and counsel conferred off the record, after which the court stated: "Mr. Avalos, your attorney ... has, thus far, saved you from going to prison for 8 years, which is what could happen to you for this kind of conduct that you've been involved in. And the plea agreement is that the worst thing that could happen to you would be that you would be sentenced to far less than that, a maximum of 3 years. Of course, 3 is less than the 8 that you're looking at possibly if you're convicted. [¶] ... [¶] And [the victim's] mother and father are friends of yours and let you stay in their house. I don't think you want them all to testify in court what happened and then a judge and jury listen to it. And then it's possible you could get 8 years in prison. [Defense counsel] has that fixed for you so the worst that could happen would be you'd get 3 years in prison."

When defense counsel requested a further section 288.1 evaluation to address various concerns raised by the court, the court responded that Avalos was 29 and the

victim was 13. The court noted: “[W]e have avoided discussing the specific details of what Mr. Avalos involved himself in up until a few minutes ago here in court. He’s pushed the issue, but it’s not been in a sense of innocence, it’s been in the sense of he’s looking for the better and best deal. And while it didn’t appear on the record, probably, a few minutes ago, what he just said to you is that he wants to go to a different court. He’s looking for something better than what he senses may happen here. And that’s not going to happen.” Defense counsel then conferred with Avalos and represented that Avalos – who maintained he never forced or threatened the victim – wished to withdraw his plea. The court denied the motion, stating: “... I’m not hearing any legal basis for a withdrawal of his plea. What I’m hearing is that Mr. Avalos doesn’t like what he thinks is going to happen and now wants to continue to manipulate the situation or pick up on the manipulation from wherever he may have left off.” The court then determined that Avalos was not a suitable candidate for probation and sentenced him to prison for the lower term of three years.

DISCUSSION

On appeal, Avalos contends he is entitled to the opportunity to withdraw his plea because (1) he had a federal constitutional right to a jury trial and proof beyond a reasonable doubt of the existence and weight of any aggravating factors that could have been used to impose the upper term; (2) because he was not advised of and did not waive those rights as to, and did not admit any, aggravating sentencing factors, his maximum potential term of imprisonment was six years, not eight years as he was advised; and (3) this erroneous advice was not harmless because the record indicates he would not have entered into the plea had he been properly advised.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Id.* at p. 490.) In *Blakely v. Washington*

(2004) 542 U.S. ____ [124 S.Ct. 2531] (*Blakely*), the United States Supreme Court held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Id.* at p. ____ [124 S.Ct. at p. 2537].)

Avalos contends that *Blakely* applies to California’s determinate sentencing law because no greater sentence than the middle term may be imposed absent additional factual findings by the court. (§ 1170, subd. (b); rule 4.420(b), (b).) As the statutorily-prescribed sentence range for a violation of section 288, subdivision (a) is three, six, or eight years, the argument runs, the trial court here could not have imposed an eight-year term absent Avalos’s waiver of his rights as to, or admission of, aggravating sentencing factors.³

“When a criminal defendant chooses to plead guilty (or, as here, no contest), both the United States Supreme Court and [the California Supreme Court] have required that the defendant be advised on the record that, by pleading, the defendant forfeits the constitutional rights to a jury trial, to confront and cross-examine the People’s witnesses, and to be free from compelled self-incrimination. [Citations.] In addition, [the California Supreme Court] has required, as a judicially declared rule of state criminal procedure,

³ We note that the written change of plea form initialed and signed by Avalos advised, in part, that “[t]he matter of probation and sentence is to be determined solely by the court.” “[N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. [Citations.]” (*Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2541].) We express no opinion concerning whether, assuming *Blakely* applies, the written form constitutes an adequate waiver with respect to aggravating sentencing factors.

that a pleading defendant also be advised of the direct consequences of his plea. [Citations.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 633-634; *People v. Walker* (1991) 54 Cal.3d 1013, 1020.) One of those consequences is the permissible range of punishment provided by statute. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.)

Pursuant to *Apprendi* and *Blakely*, Avalos argues, here the range was no more than six years in prison. This being the case, the condition of his plea agreement which imposed a middle term sentence did confer no benefit on him, and it is reasonably probable he would not have pleaded no contest if properly advised.

The extent, if any, of *Blakely*’s application to California’s determinate sentencing law is the subject of much appellate court tumult, but, as yet, no definitive answer. Insofar as this case is concerned, we need not add our voices to the fray: assuming Avalos was misadvised as to the maximum potential sentence he faced, he has failed to establish prejudice.

Because “[a]dvisement of the sentencing range is a judicially declared rule of criminal procedure, not a constitutionally compelled rule” (*People v. Hellgren* (1989) 208 Cal.App.3d 854, 858; see *Bunnell v. Superior Court, supra*, 13 Cal.3d at p. 605), “a defendant who has pleaded guilty after receiving inadequate or erroneous advice from the trial court with regard to the potential consequences of a plea generally is entitled to obtain relief only by establishing that he or she was prejudiced by the erroneous advice, i.e., by establishing, in the present context, that but for the trial court’s erroneous advice ..., the defendant would not have entered the guilty plea.” (*In re Moser* (1993) 6 Cal.4th 342, 345.) In other words, “[a] showing of prejudice requires the appellant to demonstrate that it is reasonably probable he would not have entered his plea if he had

been [properly advised].’ [Citations.]” (*People v. Walker, supra*, 54 Cal.3d at p. 1023; see *In re Moser, supra*, at p. 352.)⁴

Avalos says the record shows a reasonable probability that he would not have entered into the plea bargain had he been properly advised. We disagree. Significantly, the consideration for the plea bargain was not illusory, as Avalos claims. In addition to a six-year lid, the agreement included an indicated lower term sentence. We find it difficult to believe someone who clearly hoped for a grant of probation would have been willing to go to trial and risk an even greater sentence than the three years the court had indicated was the maximum it would impose. Although three additional years may not seem like a long time in the greater scheme of things, we suspect it is not insignificant to the person actually serving the sentence. More importantly, even assuming, as the prosecutor stated, the People would have been unable to prove force at trial, such that Avalos presumably would not have been facing two charges each of rape and aggravated sexual assault of a child, nothing suggests he would not have had to stand trial on two counts of violating section 288 on separate occasions. Whatever the dynamics of the relationship between Avalos and the victim, the fact remains that she was 13 and he was 29. Had he been convicted at trial, it is highly unlikely he would have received a lesser sentence than he did pursuant to the plea agreement. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 938.) Thus, even assuming misadvisement occurred, the plea bargain was very favorable to Avalos. (See *People v. Avila* (1994) 24 Cal.App.4th 1455, 1460.) This is

⁴ Such error is waived absent a timely objection. (*People v. Walker, supra*, 54 Cal.3d at p. 1023.) As the People do not assert this procedural bar in the present case, we have no occasion to determine whether it would be unfair to hold that Avalos should have objected to the alleged misadvisement where *Apprendi* had been decided by the time of his change of plea and sentencing, but *Blakely* had not. (See *In re Moser, supra*, 6 Cal.4th at p. 352, fn. 8.)

simply not a case in which the advice that Avalos was facing at most a six-year term, if given, would have made a no contest plea less attractive. (See *People v. Hellgren*, *supra*, 208 Cal.App.3d at p. 858.) Nothing suggests Avalos had any reluctance toward, or second thoughts about, the plea until it became apparent he was likely to receive a prison term instead of probation. “‘The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering his decision.’ [Citation.] Post-plea apprehension regarding the anticipated sentence, even if it occurs well before sentencing, is not sufficient to compel the exercise of judicial discretion to permit withdrawal of the plea of guilty. [Citation.]” (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103-104; see *People v. Donegan* (1942) 53 Cal.App.2d 202, 206.) “A plea may not be withdrawn simply because the defendant has changed his mind. [Citation.]” (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

In short, we conclude that, even assuming Avalos was misadvised, pursuant to *Blakely*, of his maximum potential sentence, he has failed to establish prejudice. Accordingly, he is not entitled to reversal or remand to afford him the opportunity to withdraw his plea.

Our review of the record reveals that the abstract of judgment incorrectly shows the date of hearing as 3-10-04 instead of 4-14-04. This clerical error should be corrected.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment showing the correct date of the sentencing hearing, and to forward a certified copy to the Department of Corrections.

Ardaiz, P.J.

WE CONCUR:

Wiseman, J.

Dawson, J.